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CASE NO. 92-685

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

STATE OF OHIO, ON RELATION OF DARLENE ROGERS,
Petitioner,

vs.

ROBERT A. TAFT, OHIO SECRETARY OF STATE, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

RESPONDENT SECRETARY OF STATE'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

LEE FISHER
Attorney General of Ohio

CHERRY LYNNE POTEET
COUNSEL OF RECORD
Assistant Chief
Chief Counsel's Staff
State Office Tower
30 E. Broad Street, 15th Floor
Columbus, Ohio 43266-0410
(614) 466-2872

Counsel for Respondent Bob Taft, Secretary of State of Ohio

QUESTIONS PRESENTED

1. Is a decision of a state court of last resort denying a writ of mandamus on state law grounds reviewable by this Court?

2. Do the doctrines of *res judicata* and collateral estoppel prevent relitigation in a state court of issues that were previously raised by the same party in a federal court action?

3. Does an alleged conflict between two decisions of a state court of last resort or between a decision of a state court of last resort and a position asserted by a party in a brief in another case create a conflict reviewable by this Court?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 2

CONCLUSION 9

APPENDIX A-1

TABLE OF AUTHORITIES

CASES **Page**

Armour v. Ohio, 775 F.Supp.
1044 (N.D Ohio 1991) 1, 2, 5, 6

Federated Department Stores v. Moitie,
452 U.S. 394 (1981) 5

Herb v. Pitcairn, 324 U.S. 117 (1945) 4

Layne & Bowler Corp. v. Western Wells Works, Inc.,
261 U.S. 387 (1923) 2

Michigan v. Long, 463 U.S. 1032 (1982) 4, 5

Migra v. Warren City School Dist. Bd. of Educ.,
465 U.S. 75 (1984) 5

Rice v. Sioux City Memorial Park Cemetery, Inc.,
349 U.S. 70 (1955) 2

Sochor v. Florida,
___ U.S. ___, 112 S. Ct. 2114 (1992) 5

State ex rel. Rogers v. Taft,
64 Ohio St. 3d 193, 594 N.E. 2d 576 (1992) ... *passim*

Thornburg v. Gingles, 478 U.S. 30 (1986) 7

Voinovich v. Ferguson, 63 Ohio St.3d 198,
586 N.E. 2d 1020 (1992) 6

*George V. Voinovich, Governor of the State of Ohio,
et al. v. Barney Quilter, Speaker Pro Tempore
of the Ohio House of Representatives, et al.*,
United States Supreme Court
Case No. 91-1618 ..... 1, 2, 7, 8

TABLE OF AUTHORITIES cont.

Page

STATUTES

Ohio Rev. Code §3501.05(C) 3

Ohio Rev. Code §3501.05(M) 3

OTHER AUTHORITIES

Sup. Ct. R. 10 2

Sup. Ct. R. 35 1

Ohio Const. Art. XI §§4, 9, and 11 6

STATEMENT OF THE CASE

Petitioner Darlene Rogers[1] seeks review of a decision of the Ohio Supreme Court refusing to issue a writ of mandamus against the Respondents Bob Taft, Secretary of State of Ohio and the Mahoning County Board of Elections. Petitioner sought a writ ordering that all county commissioners and common pleas court judges in Mahoning County be elected from single member districts rather than at large.[2]

Petitioner's statement of the case discusses the facts in *Armour v. Ohio*, 775 F. Supp. 1044 (N.D. Ohio 1991) and *George V. Voinovich, Governor of the State of Ohio, et al. v. Barney Quilter, Speaker Pro Tempore of the Ohio House of Representatives, et al.*, United States Supreme Court Case No. 91-1618, but only briefly mentions the case in which certiorari is actually being sought. Petitioner's discussion of *Armour*, which challenged under the Voting Rights Act the 1981 reapportionment of the General Assembly districts in Mahoning County, Ohio, merely emphasises the fact that the issue on which Petitioner seeks review was first asserted in *Armour*, and should properly be pursued in that action. Contrary to Petitioner's assertion, this case is not related

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[1] Petitioner Darlene Rogers was the sole Plaintiff in the court below. Petitioner now asserts that she "appeals here solely in her capacity as a member of the *Armour* class and on behalf of the *Armour* class." Petition for a Writ of Certiorari at 4. However, this case was not brought as a class action nor was class certification ever sought or obtained in this case. Class certification is not simply transferable from one case to another, and the rights of a class cannot be asserted when a class has not been certified. Petitioner has filed a motion seeking to substitute Isadore Blakeny as the Petitioner in this matter. Respondents have opposed this motion because such a substitution is not authorized by Rule 35 of the Supreme Court, and if Petitioner no longer wishes to pursue the matter, the proper procedure is to dismiss the action, not substitute parties.

[2] Petitioner also sought a writ ordering that she be placed on the June 2, 1992 Democratic primary election ballot as a candidate for nomination in the 64th Ohio General Assembly House district, however, she is not contesting the Ohio Supreme Court's rejection of this claim.

to *Voinovich v. Quilter*, which addresses the 1991 statewide reapportionment of Ohio's General Assembly by the Apportionment Board. Local elections for county commissioners and judges are not under the jurisdiction of the Apportionment Board and are not at issue in the *Voinovich v. Quilter* case.

The Ohio Supreme Court, in a *per curiam* decision, held that under state law, Petitioner had no legal right to the relief sought, Respondents had no clear legal duty to perform the requested acts, and Petitioner had an adequate remedy at law to pursue in the *Armour* court. *State ex rel. Rogers v. Taft*, 64 Ohio St.3d 193, 198, 594 N.E.2d 576 (1992).

REASONS FOR DENYING THE WRIT

Whether to grant review on a writ of certiorari is solely within the discretion of this Court. Sup. Ct. R. 10. Before a writ of certiorari will issue, Petitioner must demonstrate to the satisfaction of this Court that her case presents "special and important reasons" deserving attention. *Id.* These reasons "imply a reach to a problem beyond the academic or the episodic." *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955). They must involve "principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals," *Layne & Bowler Corp. v. Western Wells Works, Inc.*, 261 U.S. 387, 393 (1923) *quoted in Rice*, 349 U.S. at 619-20, or between state courts of last resort. Sup. Ct. R. 10.

Although Petitioner does not identify which of the above criteria are met by this case, a review of the Petition for a Writ of Certiori and the opinion below demonstrates that this case does not warrant this Court's review.

I. THE DECISION OF THE OHIO SUPREME COURT SHOULD NOT BE REVIEWED BECAUSE IT RESTS UPON INDEPENDENT AND ADEQUATE STATE GROUNDS.

Petitioner is seeking review of the decision of the Ohio Supreme Court refusing to issue a requested writ of mandamus ordering Respondent Secretary of State to construct single member majority-minority districts (districts in which a majority of the voters are African-Americans) for judicial and county commissioner elections in Mahoning County Ohio. The Ohio Supreme Court succinctly rejected this claim as follows:

> Similarly, we find no merit in relator's third claim for relief. She claims that respondent Taft's adoption of the position that majority-minority districts must be created wherever possible estops him from denying it in this case, and that R.C. 3501.05(C) and (M) then compel him to instruct the respondent-board to construct, prior to the primary election, such districts in Mahoning County for elections that would otherwise be at large. R.C. 3501.05(C) requires the Secretary of State to "[p]repare rules and instructions for the conduct of elections"; R.C. 3501.05(M) requires him to "[c]ompel the observance by election officers in the several counties of the requirements of the election laws[.]" We find nothing in these statutes requiring the board to act as an apportionment agent, whatever the Secretary of State's views may be, or may have been, on majority-minority districts. Nor has relator adduced any evidence that the state has violated the Fifteenth Amendment to the United States Constitution or the Voting Rights Act of 1965 by providing for election of judges, county commissioners, and others at large instead of from separate districts.

State ex rel. Rogers v. Taft, 64 Ohio St.3d at 195-96.

The Ohio Supreme Court clearly decided this case on independent and adequate state law grounds, holding that the Ohio statutes relied upon by Petitioner did not create a clear legal duty in the Respondents to reapportion at large elections for judges and county commissioners in Mahoning

County to single member districts. As the Ohio Supreme Court concluded:

> "In order to grant a writ of mandamus, a court must find that the relator has a clear legal right to the relief prayed for, that the respondent is under a clear legal duty to perform the requested act, and that relator has no plain and adequate remedy at law." *State ex rel. Westchester Estates, Inc. v. Bacon* (1980), 61 Ohio St.2d 42, 399 N.E.2d 81, paragraph one of the syllabus. Relator having failed to establish all three of these elements in any of her claims for relief, we hereby deny the writ.

State ex rel. Rogers v. Taft, 64 Ohio St.3d at 198.

This Court has consistently refused to review state court judgments that rest upon independent and adequate state grounds. "This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds." *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945). This rule prevents decisions of this Court from being merely advisory, without power to affect the state court judgment. Any decision in this case would be merely advisory, for the Ohio Supreme Court has clearly held that the state laws relied upon by the Petitioner create no right to the writ of mandamus sought.

This Court has held that even if a state court's decision rests on alternative state and federal grounds, a writ of certiorari will not issue. "If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision." *Michigan v. Long*, 463 U.S. 1032, 1041 (1982). Here, the Ohio Supreme Court expressly held that the Ohio statutes relied upon by the Petitioner did not create a clear legal duty for the Respondents to reapportion local Mahoning county elections. On its face, the Ohio Supreme Court's decision does not "rest primarily on federal law" *Michigan v. Long*,

463 U.S. at 1040, and is not "interwoven with federal law." *Id.*

It is certainly "an Olympic stretch", *Sochor v. Florida*, ___ U.S. ___ , 112 S.Ct 2114 (1992), to say that the Ohio Supreme Court's single sentence: "Nor has relator adduced any evidence that the state has violated [federal law]. . .", *State ex rel. Rogers v. Taft*, 64 Ohio St. 3d at 196, is sufficient to vest this Court with jurisdiction. As the decision of the Ohio Supreme Court rests upon independent and adequate state law grounds, a writ of certiori should not issue.

II. A WRIT OF CERTIORARI SHOULD NOT ISSUE BECAUSE THE CLAIM ON WHICH PETITIONER SEEKS REVIEW IS BARRED BY THE DOCTRINES OF *RES JUDICATA* AND COLLATERAL ESTOPPEL.

Petitioner asserts that she "is a member of plaintiff's class in *Armour*. Petitioner appeals here solely in her capacity as a member of the *Armour* class and on behalf of the *Armour* class." Petition for a Writ of Certiorari at 4. Petitioner is seeking review of an order of the Ohio Supreme Court denying her request for an order requiring Respondent Bob Taft, Secretary of State of Ohio, to change judicial and county commissioner elections in Mahoning County from at large to single member districts. The *Armour* Plaintiff class on April 21, 1992, sought this same relief from the *Armour* court. *State ex rel. Rogers v. Taft*, 64 Ohio St. 3d at 194. When the *Armour* court denied the requested relief on April 23, 1992, the *Armour* Plaintiffs filed a Notice of Appeal to this Court on April 30, 1992. On May 22, 1992, the *Armour* Plaintiffs moved to dismiss their appeal.

The doctrine of *res judicata* bars a litigant from "relitigating issues that were or could have been raised" in an earlier case. *Federated Department Stores v. Moitie*, 452 U.S. 394, 398 (1981). *Res judicata* encompasses both issue preclusion, which is frequently termed collateral estoppel, and claim preclusion. *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 77 n.1 (1984). The issue on which Petitioner

is seeking a writ of certiorari from this Court has already been litigated and decided by the *Armour* court and thus the doctrines of collateral estoppel and *res judicata* bar Petitioner's attempts to relitigate the issue.

Petitioner should not be permitted to bypass the *Armour* court by asserting in another forum, "on behalf of the *Armour* class," a claim already asserted in the *Armour* court. If the *Armour* class seeks to impose majority-minority single member districts on elections that are presently at large in Mahoning County, they must pursue that claim in the *Armour* court and through the process of appeals from that court. Therefore, a writ of certiorari should not issue.

III. THE DECISION OF THE OHIO SUPREME COURT DOES NOT CONFLICT WITH THE DECISION OF ANOTHER STATE COURT OF LAST RESORT, A FEDERAL COURT OF APPEALS, OR THIS COURT.

Petitioner asserts that the Ohio Supreme Court's statement in this case that evidence is required to establish a claim under the Voting Rights Act conflicts with the same court's interpretation in *Voinovich v. Ferguson*, 63 Ohio St.3d 198, 586 N.E.2d 1020 (1992) that Ohio's 1991 General Assembly reapportionment plan is constitutional. Petition for a Writ of Certiorari at 11. A review of the Ohio Supreme Court's one page *per curiam* decision in *Voinovich v. Ferguson* reveals, however, that the only question decided in that case was whether the plan adopted by the Apportionment Board in redistricting the Ohio General Assembly met the population requirements of Ohio Const. Art. XI §§ 4, 9, and 11. The Voting Rights Act was not discussed in the opinion. It is apparent from a comparison of the decision below and the Ohio Supreme Court's decision in *Voinovich v. Ferguson* that there is no conflict between the two decisions.

Even assuming *arguendo*, that there is a conflict between the case below and *Voinovich v. Ferguson*, it is a conflict between two decisions of the Ohio Supreme Court. A conflict between its own decisions should be resolved by the Ohio

Supreme Court itself, not by this Court. Under Rule 10 of the United States Supreme Court Rules of Procedure, this Court will grant a writ of certiorari to resolve a conflict between a decision of a state court of last resort and a decision of another state court of last resort, a federal court of appeals, or this Court. This rule recognizes that conflicts between different opinions of the same court are a matter for that court to resolve, and are not of sufficient importance to warrant the issuance of a writ of certiorari.

The statement of the Ohio Supreme Court which Petitioner states "gave rise to this Petition," Petition for a Writ of Certiorari at 7, is: "[n]or has Relator adduced any evidence that the state has violated the Voting Rights Act . . . . *State ex rel Rogers v. Taft*, 64 Ohio St.3d at 196. Petitioner concedes, however, that requiring a person alleging a violation of the Voting Rights Act to present evidence to prove a violation before relief can be granted is a correct statement of law and is in compliance with, and does not conflict with, the decision of this Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986) and the decision of the three judge district court in *Voinovich v. Quilter, supra*. Petition for a Writ of Certiorari at 8-11. As the Ohio Supreme Court's decision is admittedly in agreement with, rather than in conflict with, the relevant decisions, a writ of certiori should not issue.

The only other "conflict" the Petitioner points out is an alleged conflict between the court's decision below and a statement in the Pretrial Brief of the Defendants in *Voinovich v. Quilter, supra*. Petition for a Writ of Certiorari at 5. A conflict between a state supreme court decision and the position advocated by a party in a brief in another case certainly is not a legal conflict which should be addressed by this Court.

IV. THE OHIO SUPREME COURT HAS NOT DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

Petitioner argues that this case merits certiorari because

it presents the issue of whether, under the Voting Rights Act, evidence of discrimination is required before creating majority-minority districts. Petition for a Writ of Certiorari at 11.

Petitioner concedes, however, that this issue is already being addressed by this Court in *Voinovich v. Quilter, supra,* a case in which this Court has already issued a writ of certiorari and which is scheduled for oral argument on December 8, 1992. Petition for a Writ of Certiorari at 4. Petitioner asserts that this case is "directly related to *George V. Voinovich, Governor of the State of Ohio, et al. v. Barney Quilter, Speaker Pro Tempore of the Ohio House of Representatives, et al.,* Case No. 91-1618 and should, if certiorari is granted, be consolidated with *Voinovich* for oral argument during the Court's October term." Petition for a Writ of Certiorari at 4.

There is no reason to grant certiorari in this case so that it can be consolidated with *Voinovich v. Quilter.* There are no facts presented by this case which would shed light on the issues presented in *Voinovich v. Quilter,* for this case was decided by the Ohio Supreme Court as a matter of law before an agreed statement of facts was even filed with the court. In addition, there are no legal issues presented by this case which warrant consolidation of this matter with *Voinovich v. Quilter.*

As this Court is aware, the *Voinovich v. Quilter* case concerns Ohio's decennial redistricting of its General Assembly. Petitioner here is seeking review of a decision denying, on state law grounds, her request for an order requiring common pleas judges and county commissioners in Mahoning County, Ohio to be elected from single member districts rather than at large. Petition for a Writ of Certiorari at 6, footnote 2. The only way these cases are interrelated is that Petitioner is attempting to create a right to majority-minority districts in judicial and county commissioner races in Mahoning County on the basis of language in a Pretrial Brief of the Defendants filed in the three-judge court in *Voinovich v. Quilter.* This tenuous relationship does not

support consolidation. Thus, a writ of certiorari should not issue.

CONCLUSION

For the preceding reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

LEE FISHER
Attorney General of Ohio

CHERRY LYNNE POTEET
COUNSEL OF RECORD
Assistant Chief
Chief Counsel's Staff
State Office Tower
30 E. Broad Street, 15th Floor
Columbus, Ohio 43266-0410
(614) 466-2872

Counsel for Respondent Bob Taft,
Secretary of State of Ohio

NOVEMBER, 1992

Ohio Constitution Article XI §4

§4 [Population of each senate district.]

The population of each senate district shall be substantially equal to the ratio of representation in the senate, as provided in section 2 of this Article, and in no event shall any senate district contain a population of less than ninety-five per cent nor more than one hundred five per cent of the ratio of representation in the senate as determined pursuant to this Article.

Ohio Constitution Article XI §9

§9 [When population of county is fraction of ratio of representation.]

In those instances where the population of a county is not less than ninety per cent nor more than one hundred ten per cent of the ratio of representation in the house of representatives, reasonable effort shall be made to create a house of representatives district consisting of the whole county.

Ohio Constitution Article XI §11

§11 [Senate districts.]

Senate districts shall be composed of three contiguous house of representatives districts. A county having a least one whole senate ratio of representation shall have as many senate districts wholly within the boundaries of the county as it has whole senate ratios of representation. Any fraction of the population in excess of a whole ratio shall be a part of only one adjoining senate district. Counties having less than one senate ratio of representation, but at least one house of representatives ratio of representation shall be part of only one senate district.

The number of whole ratios of representation for a county shall be determined by dividing the population of the county

by the ratio of representation in the senate determined under section 2 of this Article.

Senate districts shall be numbered from one through thirty-three and as provided in section 12 of this Article.

OHIO REVISED CODE §3501.05

3501.05 Duties and powers of secretary of state

The secretary of state shall:

(A) Appoint all members of boards of elections;

(B) Advise members of such boards as to the proper methods of conducting elections;

(C) Prepare rules and instructions for the conduct of elections;

(D) Publish and furnish to the boards from time to time a sufficient number of indexed copies of all election laws then in force;

(E) Edit and issue all pamphlets concerning proposed laws or amendments required by law to be submitted to the voters;

(F) Recommend to boards the form of registration cards, blanks, and records;

(G) Determine and prescribe the forms of ballots and the forms of all blanks, cards of instructions, pollbooks, tally sheets, certificates of election, and all forms and blanks required by law for use by candidates, committees, and boards;

(H) Prepare the ballot title or statement to be placed on the ballot for any proposed law or amendment to the constitution to be submitted to the voters of the state;

(I) Certify to the several boards the forms of ballots and

names of candidates for state offices, and the form and wording of state referendum questions and issues, as they shall appear on the ballot;

(J) Approve ballot language for any local question or issue;

(K) Receive all initiative and referendum petitions on state questions and issues and determine and certify to the sufficiency of such petitions;

(L) Require such reports from the several boards as are provided by law, or as he deems necessary;

(M) Compel the observance by election officers in the several counties of the requirements of the election laws;

(N) Investigate the administration of election laws, frauds, and irregularities in elections in any county, and report violations of election laws to the attorney general or prosecuting attorney, or both, for prosecution;

(O) Make an annual report to the governor containing the results of elections, cost of elections in the various counties, a tabulation of the votes in the several political subdivisions, and such other information and recommendations relative to elections as he deems desirable;

(P) Prescribe and distribute to boards of elections a list of instructions indicating all legal steps necessary to petition successfully for local option elections under sections 4301.32 to 4301.41, 4303.29, 4305.14, and 4305.15 of the Revised Code;

(Q) Perform such other duties as are required by law.

In the performance of his duties as the chief election officer, the secretary of state may administer oaths, issue subpoenas, summon witnesses, compel the production of books, papers, records, and other evidence and fix the time and place for hearing any matters relating to the administration and enforcement of the election laws.

In any controversy involving or arising out of the adoption of registration or the appropriation of funds therefor the secretary of state may, through the attorney general, bring an action in the name of the state in the common pleas court of the county where the cause of action arose or in an adjoining county thereto, to adjudicate the question.

In any action involving the laws in Title XXXV of the Revised Code wherein the interpretation of those laws is in issue in such a manner that the result of the action will affect the lawful duties of the secretary of state or of any board of elections, the secretary of state may, on his motion, be made a party.

The secretary of state may apply to any court that is hearing a case in which he is a party, for a change of venue as a substantive right and such change of venue shall be allowed, and the case removed to the common pleas court of an adjoining county named in the application, or, where there are cases pending in more than one jurisdiction that involve the same or similar issues, Franklin county.